Supreme Court, U.S.
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In The
Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

v.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY, and the DEPARTMENT OF AGRONOMY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED*

Does section 704(a) of Title VII of the 1964 Civil Rights Act, which prohibits retaliation against an employee for filing a charge with the EEOC, permit an employer to engage in retaliatory action so long as that reprisal does not constitute an "ultimate employment decision"?

* The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Manjit S. Kang respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 3, 2003.

OPINIONS BELOW

The October 3, 2003, decision of the Court of Appeals, which is not officially reported, is reprinted in the Appendix to the petition. (1a-6a). The January 31, 2003, judgment of the District Court, which is not officially reported, is reprinted in the Appendix to the petition. (7a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on October 3, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted,

or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

Petitioner Manjit Kang is a professor at Louisiana State University ("LSU") in the field of agronomy.[1] In 1996 Kang filed a charge with the EEOC, alleging that LSU had discriminated against him when it selected the Department Head of the Department of Agronomy. Kang asserted that he was of East Indian ancestry and had been rejected on the basis of national origin in favor of a less qualified white candidate. Kang subsequently filed in federal district court an action under Title VII challenging the denial of that promotion. The court in that action granted summary judgment in favor of LSU. (App. 1a-2a and n.1).

In 1997 Kang filed a second charge with the EEOC, alleging that LSU had retaliated against him in a variety of ways for having filed the 1996 discrimination charge. Section 704(a) of Title VII prohibits retaliation against an employee for having filed a discrimination charge with the EEOC. Finally, in February 2000 Kang filed yet another charge of retaliation, alleging that LSU had taken several additional retaliatory acts in reprisal for the 1996 and 1997 charges. It is this third Title VII charge which is the basis of the instant lawsuit.

[1] Kang's appointment to LSU was apportioned between two separate campuses, each with its own chancellor: the LSU Agricultural Center (90%) and the LSU Agricultural and Mechanical College (10%).

Kang commenced this action in December 2000 in the United States District Court for the Middle District of Louisiana. The complaint alleged that LSU[2] had retaliated against Kang in five distinct ways. The most important alleged retaliatory act was giving Kang a smaller pay raise in reprisal for those earlier Title VII charges. The complaint asserted that in retaliation for the prior charges LSU officials had given Kang a raise of only 3%, which was lower than the average pay raise. The raises awarded to other full professors ranged from 0% to 7%. (App. 2a). In subsequent submissions Kang asserted that this below-average raise left him the lowest paid full professor in the department.[3]

The other alleged acts of retaliation included poor performance evaluations, writing up Kang for laboratory problems for which LSU knew he was not responsible, and unwarranted criticism.[4] (App. 2a).

LSU moved for summary judgment on the ground, inter alia, that Fifth Circuit precedent permitted the University to engage in the particular retaliatory practices alleged. LSU relied on the Fifth Circuit's "ultimate employment decision" doctrine, which construes section 704(a) of Title VII to forbid only those retaliatory actions which constitute an "ultimate employment decision." Those decisions stem from the seminal Fifth Circuit

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[2] The defendants named in the complaint were the Board of Supervisors of Louisiana State University and the University's Department of Agronomy.

[3] App. 2a.

[4] Complaint, Paragraphs 9-13.

decision in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, *cert. denied*, 522 U.S. 932 (1997).

LSU argued, more specifically, that section 704(a) permitted an employer to reduce an employee's pay raise in retaliation for protected activity, at least so long as the employee was not denied a raise completely.

> Plaintiff's second claim is that he received a less-than-average pay raise of 3% . . . [T]his allegation . . . fails to constitute an ultimate employment decision. See *Mattern*, *supra*. While a decrease in pay can constitute retaliation, logically, a smaller-than-average raise cannot be considered the equivalent to a pay cut because, even if it is less than that given to others, it is still a raise. . . . Plaintiff is not entitled to any raise, much less to one equal to the "average" given to other professors. As such, his failure to receive a pay increase in excess of the arithmetic average cannot be an act of retaliation.

(Memorandum in Support of Defendant's Motion for Summary Judgment, p. 6).

In response, Kang expressly challenged the correctness of the ultimate employment decision doctrine in *Mattern*. Kang argued that at least three other circuits had expressly rejected the ultimate employment doctrine, as had the EEOC.[5] The district court, understandably bound by Fifth Circuit precedent, granted the motion to dismiss. (App. 7a).

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[5] Plaintiff's Opposition Memorandum to the Defendants' Motion for Summary Judgment, pp. 5-6.

In the court of appeals Kang again attacked the ultimate employment decision doctrine, arguing that *Mattern* and its progeny conflicted with decisions in the Seventh, Ninth and District of Columbia circuits.[6] The court of appeals acknowledged the existence of that conflict (App. 5a), and candidly recognized that

> "the continued vitality of the 'ultimate employment decision' doctrine is questionable in light of" recent Supreme Court decisions.

(App. 5a, *quoting Felton v. Polles*, 315 F.3d 470, 486-87 (5th Cir. 2002)). The panel below concluded, however, that it was bound by the earlier Fifth Circuit decision in *Mattern*. (App. 5a-6a).

The court of appeals agreed that in some instances it would violate section 704(a) for an employer to retaliate against an employee by denying that worker *any* pay raise at all. (App. 4a). But so long as the victim was given some pay raise, the Fifth Circuit insisted, Title VII permitted the employer to retaliate against the employee by giving him or her a smaller raise than would have been awarded in the absence of the protected activity.

> In the present case, . . . it is undisputed that [Kang] did receive a pay raise and that his raise was both substantial and larger than that received by some of his colleagues. Although we have never explained precisely when *denials* of pay raises constitute ultimate employment decisions, under the circumstances of this case, we cannot say that Kang has suffered an adverse

[6] Brief of Appellant, No. 03-30214 (5th Cir.), pp. 14-15.

> employment action. . . . [O]ur prior decisions compel this conclusion.

(App. 4a-5a) (Footnote omitted; emphasis added).

REASON FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S "ULTIMATE EMPLOYMENT DECISION" DOCTRINE CONFLICTS WITH DECISIONS IN EIGHT OTHER CIRCUITS

The Question Presented in this case concerns a mature and widely recognized conflict about the meaning of the anti-retaliation provision of Title VII. Section 704(a) forbids reprisals against employees for filing a Title VII charge, participating in an EEOC investigation, or otherwise opposing practices made illegal by Title VII. The Fifth Circuit applied in this case its longstanding rule that employers may engage in retaliation so long as the sanction inflicted on the employee in question does not constitute an "ultimate employment decision." As elaborated by a series of Fifth Circuit decisions, ultimate employment decisions are limited to such major employment actions as hiring, firing, demotions and wage reductions. Every other circuit to consider this restriction on section 704(a) has rejected the ultimate employment decision doctrine.

The ultimate employment decision doctrine is a well entrenched part of Fifth Circuit jurisprudence, to which that circuit continues to adhere despite the contrary views of numerous other circuits. The Fifth Circuit's ultimate employment decision doctrine was first announced in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997). In the subsequent

years the Fifth Circuit has in 20 decisions[7] applied that idiosyncratic interpretation of section 704(a) (and of similar anti-retaliation provisions of other federal employment statutes) to declare that retaliatory actions allegedly taken by an employer were entirely lawful.

Eight circuits have expressly and emphatically rejected the Fifth Circuit's ultimate employment decision doctrine. Several courts of appeals have candidly recognized the resulting inter-circuit conflict.

In *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), the Ninth Circuit disapproved the Fifth Circuit's ultimate employment decision doctrine, holding instead that section 704(a) forbids any retaliatory practice "reasonably likely to

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[7] *McDonald v. Entergy Operations Inc.*, 2003 WL 22134565 *2 (5th Cir.); *Ackel v. National Communications, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003); *Johnson v. Louisiana ex rel. Louisiana Board of Supervisors*, 79 Fed. Appx. 684, 688 (5th Cir. 2003); *Bell v. City of Dallas*, 72 Fed. Appx. 82, 83 (5th Cir. 2003); *Fortenberry v. State of Texas*, 2003 WL 22135639 *2 (5th Cir. 2003); *Kang v. Board of Supervisors of Louisiana State University*, 2003 WL 22272920 (5th Cir.); *Foley v. University of Houston Syst.*, 324 F.3d 310, 313, 317 (5th Cir. 2003); *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528 (5th Cir.), *cert. denied*, 124 S.Ct. 82 (2003); *Banks v. East Baton Rouge Parish School Bd.*, 320 F.3d 570 (5th Cir.), *cert. denied*, 124 S.Ct. 82 (2003); *Zaffuto v. City of Hammond*, 308 F.3d 485, 492 (5th Cir. 2002); *Soledad v. U.S. Dept. of Treasury*, 304 F.3d 500, 507 (5th Cir. 2002); *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 651, 658 (5th Cir. 2002); *Hunt v. Rapides Healthcare Syst.*, 277 F.3d 757, 769 (5th Cir. 2002); *Mota v. University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2001); *Thomas v. Texas Dept. of Criminal Justice*, 220 F.3d 389, 395 n.2 (5th Cir. 2000); *Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000); *Watts v. Kroger Co.*, 170 F.3d 505, 508, 510 (5th Cir. 1999); *Burger v. Central Apartment Mgmt.*, 168 F.3d 875, 878 and n.3 (5th Cir. 1999); *Webb v. Cardiothoracic Surgery Assocs. of N. Tex.*, 139 F.3d 532, 540 (5th Cir. 1998); *Messer v. Meno*, 130 F.3d 130, 140 (5th Cir. 1997).

deter employees from engaging in protected activity." 217 F.3d at 1243.

> The circuits are currently split as to what constitutes an adverse employment action [prohibited by section 704(a)]. . . . [C]ircuits that define adverse employment action broadly are the First, Seventh, Tenth, Eleventh and D.C. Circuits. An intermediate position is held by the Second and Third Circuits. The most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits. . . . The Second and Third Circuits hold an intermediate position within the circuit split.

217 F.3d at 1241-42.

The Eleventh Circuit also has expressly rejected the Fifth Circuit rule.

> There is a circuit split on this issue. While the Eighth Circuit has sided with the Fifth Circuit, . . . the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. . . . We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.

Wideman v. Wal-Mart Stores, 141 F.3d 1453, 1456 (11th Cir. 1998).

In refusing to adopt the ultimate employment decision doctrine, the Fourth Circuit specifically disapproved the reasoning of the seminal Fifth Circuit decision in *Mattern*.

> [T]he majority of circuits have either implicitly or explicitly rejected the "ultimate employment decision" standard in § 2000e-3 cases. . . . [I]n *Mattern* . . . the Fifth Circuit expressly held insufficient the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized could constitute adverse employment action under § 2000e-3. . . . But "ultimate employment decision" is not the standard in this circuit. . . . [W]e have expressly rejected distinctions, like those drawn by *Mattern*.

Von Gunten v. Maryland, 243 F.3d 858, 864-65 (4th Cir. 2001).

Five other circuits have construed section 704(a) far more broadly than the Fifth Circuit. The First Circuit holds that section 704(a) forbids "actions such as . . . disadvantageous transfers or assignments, . . . unwarranted negative job evaluations and toleration of harassment by other employees," *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994), all practices that are legal forms of retaliation in the Fifth Circuit. In the instant case one of the very retaliatory actions allegedly taken against Kang, and held lawful by the Fifth Circuit, was an assertedly unwarranted negative job evaluation. (App. 2a).

The Second Circuit construes section 704(a) to forbid any "materially adverse change" in the plaintiff's circumstances, *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997). Such a retaliatory act is unlawful even if it does not "affec[t] money or benefits." *Wannamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997). In the Fifth Circuit even retaliation which *does*

affect money, as in the instant case, can be outside the protections of section 704(a).

The Seventh Circuit also interprets section 704(a) broadly, to include such retaliatory acts as putting "the complainant in a more unfriendly working environment." *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996). The Tenth Circuit avowedly construes section 704(a) "liberally," covering such things as co-worker harassment, which the Fifth Circuit has held is permissible under the ultimate employment decision doctrine. *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998). In the District of Columbia Circuit retaliation claims emphatically are not limited to "acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion," *Passer v. American Chemical Soc.*, 935 F.2d 322, 331 (D.C.Cir. 1991), the very limitation long imposed by the Fifth Circuit.

In the instant case the Fifth Circuit candidly acknowledged that its ultimate employment decision doctrine is more restrictive than "the broader rule adopted in some other circuits" (App. 5a), citing the contrary rule in the First, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits. (App. 5a n.13). In *Zaffuto v. City of Hammond*, 308 F.3d 485, 492 (5th Cir. 2002), the Fifth Circuit recognized that

> [t]he courts of appeals are split on this issue. The Fifth and the Eighth Circuit have adopted the "ultimate employment decision" standard. . . . Every other circuit to address the issue has held that employment decisions falling short of ultimate employment decisions may suffice.

Similarly, the Fifth Circuit acknowledged the existence of this circuit conflict in *Burger v. Central Apartment Mgmt.*, 168 F.3d 875 (5th Cir. 1999).

> Our court has analyzed [section 704(a)] in a stricter sense than some other circuits. . . . We are not alone, but we are in the minority.

168 F.3d at 878 and n.3.[8]

This case presents a uniquely appropriate vehicle for determining the correctness of the ultimate employment decision doctrine. The Fifth Circuit's decision in the instant case marks the most expansive and destructive application of that doctrine. The court below held, at the express urging of respondents, that section 704(a) permits an employer to reduce the size of the pay raise awarded to a worker for the avowed purpose of punishing that employee for having filed a Title VII charge with EEOC. Respondents, of course, deny having acted with any such motive, but under the decision below there would have been no violation of section 704(a) even if respondents candidly admitted such an invidious retaliatory purpose.

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[8] Similarly, in *Hernandez v. Crawford Building Material Co.*, 321 F. 3d 528 (5th Cir. 2003), one member of the panel observed:

> A majority of the federal circuits that have considered the question have held that the protection afforded by the anti-retaliation provision [of Title VII] extends to adverse employment actions that, while substantial, fall short of ultimate employment decisions. . . . Indeed, the only other circuit that purports to follow the "ultimate employment decision" rule, the Eighth Circuit, in practice applies something broader.

321 F.3d at 533.

In the wake of the decision in the instant case, an employer anywhere in Louisiana, Texas, or Mississippi could openly announce and implement an express policy of paying smaller raises to any employee who filed a Title VII charge, brought a Title VII action, spoke to an EEOC investigator, or complained about discriminatory treatment. If an employee had already filed a charge or lawsuit, the employer could coerce the worker into withdrawing that charge or lawsuit by threatening to slash all of his or her future raises.

The instant Fifth Circuit decision authorizing that retaliatory tactic poses a lethal threat to the administrative and judicial enforcement schemes established by Title VII. The EEOC has concluded that the ultimate employment decision doctrine obstructs enforcement of Title VII.

> [A]llowing employers to take retaliatory measures short of an "ultimate employment decision," . . . would stifle employees' willingness to complain of discrimination.[9]

> An employer who can retaliate with impunity using methods that fall short of an "ultimate employment decision" . . . will inevitably discourage employees from participating in Title VII proceedings or opposing unlawful practices.[10]

The EEOC Compliance Manual expressly rejects the ultimate employment decision doctrine.

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[9] Brief of the EEOC as Amicus Curiae in Support of Plaintiff, Von Gunten v. Maryland, No. 00-1058, pp. 24-28.

[10] Brief of the EEOC as Amicus Curiae, Wideman v. Wal-Mart Stores, No. 97-2897, pp. 16-19.

> Some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. . . . The Commission disagrees with those decisions and concludes that such constructions are unduly restrictive. The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.

EEOC Compliance Manual, ch. 8, pp. 13-15 (footnotes omitted).

The decision below is emphatically inconsistent with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *Robinson* held that a primary purpose of section 704(a) is "maintaining unfettered access to statutory remedial mechanisms." 519 U.S. at 848. The economic and deterrent impact of a retaliatory decision to reduce an employee's raise by $500 is precisely the same as a decision by the employer to award the usual raises but then impose on that worker a $500 annual fine for as long as the worker remains at the firm in question. It is inconceivable that Congress intended to permit employers to use such reprisals to punish or deter utilization of the administrative and judicial enforcement mechanisms created by Title VII.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Manjit S. KANG, Plaintiff-Appellant,
v.
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY; Louisiana State University Department of Agronomy, Defendants-Appellees.
No. 03-30214.
Summary Calendar
Oct. 3, 2003.

Appeal from the United States District Court for the Middle District of Louisiana. USDC No. 00-CV-906-C-M-1.

Before HIGGINBOTHAM, EMILIO M. GARZA and PRADO, Circuit Judges.

PER CURIAM.*

Appellant Manjit S. Kang appeals the district court's grant of Appellee's motion for summary judgment on his employment discrimination and hostile work environment claims. For the reasons stated below, we AFFIRM the district court.

I.

Since 1986, Kang has worked as a professor in the Department of Agronomy at Louisiana State University ("LSU"). In 1996, Kang filed a claim with the Equal Employment Opportunity Commission ("EEOC"), alleging

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that LSU had discriminated against him when it rejected his application to become Department Head of the Department of Agronomy. LSU selected another faculty member, a white man, for the position, and Kang believed he had been overlooked because he was of East Indian descent. On September 30, 1997, Kang filed a second claim with the EEOC, alleging that LSU retaliated against him after the filing of his first claim of discrimination. Shortly thereafter, he filed his first suit in district court, raising claims of discrimination and retaliation, but this suit was subsequently dismissed on summary judgment.[1]

On December 4, 2000, Kang filed the instant suit in district court. Kang claimed that he had been subjected to additional retaliation, complaining of five specific acts. First, in April 1999, he received a poor performance evaluation from Freddie Martin, the Head of the Department of Agronomy. Second, while he was out of the country on a lecturing assignment, he was "written up" by Appellee for "unacceptable conditions" in one of his research areas. Third, he received a less-than-average pay raise of 3% in July, 1999, making him the lowest paid professor in the department. Fourth, Appellee failed to nominate him for a teaching award, even though he had been nominated in previous years. Finally, the Department Head "unfairly and unjustly" criticized him at a faculty meeting on January 14, 2000 in front of his peers.

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[1] See *Kang v. State of Louisiana*, 229 F.3d 1147 (Table) (5th Cir.2000), *cert. denied* 531 U.S. 1126, 121 S.Ct. 881, 148 L.Ed.2d 790 (2001).

II.

The district court concluded that Kang could not make out a prima facie case of retaliation under Title VII of the Civil Rights Act of 1964[2] and granted summary judgment for Appellee because none of the acts Kang complained of constituted "ultimate employment acts."[3] We find no fault in the district court's conclusion.

To state a claim of retaliation under Title VII, plaintiff must demonstrate: "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action."[4] In *Mattern v. Eastman Kodak Co.*, we concluded that only "ultimate employment decisions" – decisions relating to "hiring, granting leave, discharging, promoting, and compensating" – satisfy the second prong of this test.[5] To satisfy this standard, the action complained of must "have more than a 'mere tangential effect on a possible future ultimate employment decision.'"[6] Thus, " 'interlocutory or mediate' decision[s] which can lead to an ultimate decision" are insufficient to support a prima facie case of

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[2] 42 U.S.C. § 2000e-3(a).

[3] *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997) (" 'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.' ".

[4] *Evans v. City of Houston*, 246 F.3d 344, 352 (5th Cir.2001) (*quoting Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir.1996)).

[5] *Mattern*, 104 F.3d at 707.

[6] *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir.2001) (*quoting Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir.2000)).

retaliation[7]. Under this standard, none of the actions that Appellant complains of, even if true[8], qualify as "ultimate employment decisions." Our decisions reject the proposition that his first complaint – that he received a poor performance evaluation – qualifies as an adverse employment decision[9]. Similarly, the other actions allegedly taken by Appellee – failing to nominate him for a teaching award, unjustly criticizing him in front of his peers at a faculty meeting, and writing him up for not keeping his research area clean – do not "constitute 'adverse employment actions' because of their lack of consequence."[10]

Kang's final allegation, however, is a closer question. Kang claims that, in July 1999, he was given a less-than-average pay raise, causing him to be the lowest paid professor in his department. In *Fierros v. Texas Department of Health*, we explained that a denial of a pay increase can be an "ultimate employment action," despite our suggestion in Mattern to the contrary[11]. In the present case, however, it is undisputed that Appellant did receive a pay raise and that his raise was both substantial and

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[7] *Mattern*, 104 F.3d at 708 (5th Cir.1997).

[8] For purposes of our review of the district court's grant of summary judgment, we accept as true Appellant's allegations. See *Casey Enterprises v. American Hardware Mutual Insurance Co.*, 655 F.2d 598, 601-02 (5th Cir.1981). Appellee, of course, denies that Kang's filing of discrimination charges in any way affected their interaction with him.

[9] *Mattern*, 104 F.3d at 708.

[10] *Id.*

[11] 274 F.3d 187, 193 (5th Cir.2001) ("In cases since *Mattern*, we have held that a denial of a pay increase and similar actions are 'ultimate employment decisions.'").

larger than that received by some of his colleagues[12]. Although we have never explained precisely when denials of pay raises constitute ultimate employment decisions, under the circumstances of this case, we cannot say that Kang has suffered an adverse employment action.

Appellant candidly admits that our prior decisions compel this conclusion. He argues, however, that our approach to Title VII retaliation cases is unduly restrictive and asks that we endorse the broader rule adopted in some other circuits[13] Indeed, we have ourselves noted that "the continuing vitality of the 'ultimate employment decision' doctrine is questionable in the light of" recent Supreme Court decisions[14]. Nonetheless, "[i]t is well-established in this circuit that one panel of this Court may not overrule another" unless the prior decision " 'is overruled, expressly or implicitly, by either the United States

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[12] Kang admits that he received a raise of 3%. Others on the LSU faculty received raises ranging from 0% to 7%.

[13] See, e.g., *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir.2001); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir.1998); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir.1996); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir.1996); *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir.1994); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.1987).

[14] See *Felton v. Polles*, 315 F.3d 470, 486-87 (discussing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)); see also *Watts v. The Kroger Co.*, 170 F.3d 505, 510 n. 4 (5th Cir.1999) (expressly declining to reach the question whether *Burlington's* definition of "tangible employment actions" is identical to *Mattern's* definition of an "adverse employment action").

Supreme Court or by the Fifth Circuit sitting en banc.'"[15] Accordingly, we decline Kang's invitation to alter our approach to Title VII retaliation claims.

III.

In addition to his claim of retaliation, Kang contends that the district court erred in dismissing his claim that Appellee's actions created a "hostile work environment." To satisfy the requirements of a claim for hostile work environment, however, a plaintiff must demonstrate that an employer's discriminatory actions were "sufficiently severe or pervasive that they . . . alter[ed] the conditions of employment and . . . create[d] an abusive working environment."[16] The actions that Kang complains of, while potentially inappropriate, do not satisfy this standard.

IV.

Because none of the actions on which Kang bases his retaliation claim rises to the level of an "ultimate employment decision," he has failed to make a prima facie showing of retaliation. He has also failed to demonstrate that the Appellee's actions were pervasive or severe enough to create a hostile work environment. For these reasons, the judgment of the district court below is AFFIRMED.

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[15] *Central Pines Land Co v. United States*, 274 F.3d 881, 893 (5th Cir.2001) (*quoting United States v. Kirk*, 528 F.2d 1057 (5th Cir.1976)).

[16] *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir.1995).

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MANJIT S. KANG

CIVIL ACTION

VERSUS

NO. 00-906-C

BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY

JUDGMENT

For the reasons read into the record:

IT IS ORDERED ADJUDGED AND DECREED that the motion for summary judgment filed on behalf of defendant is hereby GRANTED, and this action is hereby dismissed.

Baton Rouge, Louisiana, January 31, 2003.

/s/
RALPH E. TYSON
UNITED STATES
DISTRICT JUDGE

No. 03-967

In The
Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY and the DEPARTMENT OF AGRONOMY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner herein has accurately summarized the procedural history of this case. Likewise, he has correctly pointed out that this Court has jurisdiction in this matter. He has also fairly stated the issue on which the parties herein disagree. His summary of the information which this Court needs to know about this litigation is adequate. He glossed over the fact that he previously sought a writ of certiorari from this Court on this very same issue and that his request was denied. See *Kang v. Louisiana,* No. 00-705, 531 U.S. 1126 (2001). Additionally and understandably, Professor Kang did not emphasize the fact that he failed to prove that he was the victim of any discrimination. Although that is not fatal to a claim of retaliation, it certainly undercuts it.

The only information the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU")[1] would add is that those who stand accused of retaliating against Professor Kang vehemently deny having done so. LSU's decision to attempt to dispose of this matter on procedural grounds was made solely on economic grounds and not out of fear that petitioner will be able to prove the accuracy of *any* of his allegations.

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[1] It should be noted that LSU is the only defendant in this case. The LSU Department of Agronomy is not a legal entity.

SUMMARY OF ARGUMENT

Petitioner suggests that the Fifth Circuit has misinterpreted the Civil Rights Act of 1964 by too narrowly reading the term "adverse employment action" so as to require that a person show that he was subjected to an "ultimate" employment decision in order to have a claim for retaliation. He further contends that the Fifth Circuit's standard on this point is in conflict with that used by eight of the other circuits. LSU respectfully submits that petitioner's application for certiorari should be denied because the "conflict" between the circuits which he relies upon does not rise to the level of importance required for this Court to resolve it since it appears that all of the lower courts are, essentially, reaching the same result, though by different means. This Court has previously declined to resolve this "conflict," both at the invitation of petitioner herein and by others, and LSU respectfully submits that there is no reason for this Court to do so now.

ARGUMENT

MAY IT PLEASE THE COURT:

A. This "Conflict" Lacks Importance

It is well understood that Congress passed the Civil Rights Act of 1964 in order to reduce discrimination in employment based on various factors. Specifically, Section 703 of Title VII, 42 U.S.C. § 2000e(2) prohibits discrimination with respect to the "compensation, terms, conditions and privileges of employment" as well as those acts which tend to "deprive an employee of opportunities" or "adversely affect his status." Congress also sought to protect those who assert a claim for discrimination from being

subjected to retaliation for doing so. Section 704 of Title VII, 42 U.S.C. § 2000e(3), provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Although Section 2000e(3) does not use the phrase "adverse employment actions," the courts have long held that Congress did not intend to provide a higher level of protection for retaliation (in Section 2000e(3)) than it provided for discrimination (under Section 2000e(2)). See *Ross v. Communications Satellite Corporation*, 759 F.2d 355, 365 (4th Cir. 1985) *abrogated on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989); and *Mattern v. Eastman Kodak Company*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S. Ct. 336, 139 L.Ed.2d 336 (1997). Thus, it has been uniformly held that retaliation claims require proof of an "adverse employment action." Accordingly, whether discrimination or retaliation is involved, the conduct must rise to the level of an "adverse employment action" in order to be prohibited. Stated another way, Congress did not outlaw all discrimination and retaliation; only those acts which constitute an adverse employment action.

So, what constitutes an adverse employment action? Not surprisingly, not every court has used the same language in order to answer that question. However, the courts have done a remarkable job of answering that question in the same way. There is complete agreement

among the circuits that "ultimate employment decisions," such as those involving hiring,[2] granting leave, discharging,[3] promoting[4] or compensating[5] fall within the scope of the Civil Rights Act. *Von Gunten v. Maryland,* 243 F.3d 858 (4th Cir. 2001) and *Mattern v. Eastman Kodak Company, supra.* Similarly, at the other end of the spectrum, the courts have agreed that the Civil Rights Act is "neither a 'general civility code' nor does it make actionable the 'ordinary tribulations' of the workplace." *Gunnell v. Utah Valley State College,* 152 F.3d 1253, 1265 (10th Cir. 1998) (quoting *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998).) That is, "there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause." *Wideman v. Wal-Mart Stores, Inc.,* 141 F.3d 1453, 1456 (11th Cir. 1998). See also *Jeffries v. Kansas,* 147 F.3d 1220, 123-33 (10th Cir. 1998) ("tense personal relationships do not rise

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[2] This includes the refusal to rehire an employee as well as the withdrawal of a reinstatement offer. See *East v. Romine, Inc.*, 518 F.2d 332, 340 (5th Cir. 1975), *reversed on other grounds, Burdine v. Texas Dept. of Community Affairs,* 647 F.2d 513 (5th Cir. 1981) and *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73-4 (3rd Cir. 1986); and *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993).

[3] See also *Brady v. Thurston Motor Lines*, 726 F.2d 136, 141 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984). Even constructive discharges fall within the protection of the Civil Rights Act. See *West v. Marion Merrell Dow Inc.*, 54 F.3d 493, 497 (8th Cir. 1995) and *Holsey v. Armour & Co.* 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

[4] See also *Brady v. Thurston Motor Lines,* 726 F.2d 136, 141-2 (4th Cir.), *cert. denied,* 469 U.S. 827 (1984) and *Bickel v. Burkhart,* 632 F.2d 1251, 1255-06 (5th Cir. 1980).

[5] Protection of compensation even extends to the denial of severance pay. See *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (construing parallel provision under the ADEA).

to the level of actionable retaliation"); *Torres v. Pisano,* 116 F.3d 625, 640 (2nd Cir. 1997) (feeling "frightened" and "intimidated" is insufficient without a "materially adverse change in the terms and conditions of employment"); *Welsh v. Derwinski,* 14 F.3d 85, 86 (1st Cir. 1994) ("not every unpleasant matter short of [discharge or demotion] creates a cause of action" for retaliation); *Connell v. Bank of Boston,* 924 F.2d 1169, 1179-80 (1st Cir. 1991); *Cf. Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).[6]

Thus, the only area where there is some disagreement involves those situations in between those two extremes. Even in this "middle" ground, there is considerable agreement between the courts as to what is and what is not prohibited retaliation such that the "conflict" between the circuits is so small that it does not present an *important* conflict within the meaning of Rule 10 of the Rules of the

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[6] Even though the Ninth Circuit has suggested that, from an analytical standpoint, it makes more sense to conclude that all discrimination and retaliation is prohibited and that actions which are inconsequential should be resolved as a matter of damages rather than liability, in practice, it reaches the same result as other circuits. By focusing on whether the conduct in question is reasonably likely to deter employee's from engaging in protected activity, virtually the same conduct which other circuits find does not rise to the level of adverse employment actions is held, by the Ninth Circuit, to be insufficient to support a cause of action because it does not reasonably deter employees from engaging in protected activity. *Ray v. Henderson, supra,* 217 F.3d at 1243. See also *Strother v. Southern California Permanente Medical Group,* 79 F.3d 859, 869 (9th Cir. 1996) (mere ostracism by co-workers does not constitute actionable retaliation), *Steiner v. Showboat Operating Co.,* 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082, 115 S. Ct. 733, 130 L.Ed.2d 636 (1995) (lateral transfer was "just barely – if at all – characterizable as an adverse employment action.") and *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912 (9th Cir. 1996) (transfer was not considered to be an adverse employment action).

Supreme Court. That is, most cases are resolved in the same way. The Fourth Circuit has specifically recognized this result and stated that "[s]ometimes the practical differences between these two standards are difficult to discern." *Von Gunten v. Maryland*, 243 F.3d 858, 864 (4th Cir. 2001). That court also noted that only if the "ultimate employment decision" standard is "strictly applied" does it make any difference in practice. 243 F.3d at 864.

In fact, the greatest difference between the Fifth Circuit's "ultimate employment decision" standard and the "alters the terms, conditions or benefits of employment" standard employed by some other courts is that the Fifth Circuit has attempted to create a "bright-line" test whereas other circuits are relying on the more traditional *stare decisis* method of answering this question on a case-by-case basis.[7] The important point is that, whether the "rule" is announced in advance, as the Fifth Circuit has attempted to do, or the boundaries are located by way of experientially bracketing what is "in" and what is "out," as some other courts have done, the outcome is essentially the same.

Indeed, contrary to what the Fifth Circuit said in *Mattern, supra,* that it was trying to do (i.e., adopt a bright-line rule which would provide more guidance), what that Court really did in the instant case was conduct a very case-specific analysis of petitioner's claim. The court then proceeded to look at the facts of this case and, based

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[7] See also *Wanamaker v. Columbian Rope Company,* 108 F.3d 462 (2nd Cir. 1997) ("Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of "adverse.").

on those facts, concluded that Professor Kang had not suffered an adverse employment action because he "did receive a pay raise and that his raise was both substantial and larger than that received by some of his colleagues." Petitioner's Appendix, page 4a.

Stated another way, the Fifth Circuit has not held – as petitioner would have this Court believe – that, under no circumstances, can an inappropriately small pay raise constitute retaliation. In fact, just the opposite is true. In *Mattern, supra,* the Fifth Circuit specifically included compensation issues within the scope of what it called "ultimate employment actions." Thereafter, in *Fierros v. Texas Department of Health*, 274 F.3d 187, 193 (5th Cir. 2001), the Fifth Circuit held that the denial of a pay increase and similar actions constitute "ultimate employment actions." And, in reaching its decision to dismiss petitioner's lawsuit in this case, the Fifth Circuit did not retreat from its prior position. Instead, as noted above, that court only concluded that, based on the specific facts of this case, Professor Kang's pay raise was not so small that it should be considered retaliatory. Any doubt about whether, in the Fifth Circuit, the denial of a pay raise can be considered to be retaliation is completely destroyed by the Fifth Circuit's acknowledgment in this case that it has "never explained precisely when denials of pay raises constitute ultimate employment decisions." Petitioner's Appendix, page 5a.

The conclusion that this "conflict" is minor in nature is also supported by the fact that the conflict was known at the time when the Fifth Circuit announced its position and this Court denied writs in that very case. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997). Moreover, this Court has

declined to take up numerous other cases where actions less than "ultimate employment decisions" were found to be outside of the scope of protection of the Civil Rights Act of 1964.[8] In fact, this Court previously decided not to resolve this "conflict" when asked to do so by the petitioner in this case in one of his predecessor lawsuits against LSU. See *Kang v. Louisiana,* No. 00-705, 531 U.S. 1126 (2001).

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[8] See, e.g., *Bell v. City of Dallas*, 72 Fed. Appx. 82 (5th Cir. 2003), *cert. denied*, 2004 WL 46768 (2004); *Fortenberry v. Texas*, 75 Fed. Appx. 924 (5th Cir.), *cert. denied*, 2004 WL 76760 (2004); *Hernandez v. Crawford Building Material Co.*, 321 F.3d 528 (5th Cir.), *cert. denied*, 124 S. Ct. 82 (2003); *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570 (5th Cir.), *cert. denied*, 124 S. Ct. 82 (2003); *Messer v. Memo*, 130 F.3d 130 (5th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Hill v. Mississippi State Employment Service*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991) (retaliation claim rejected because based only upon allegations that co-workers stared at plaintiff, followed her, prolonged the time she had to wait for disbursement checks, relegated her file to a less desirable classification, deleted evidence of work experience from a reference form and criticized her for filing an EEO charge); *DeAngelis v. El Paso Mun. Police Officers Assn.*, 51 F.3d 591 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 473 (1995) (jury verdict overturned where employee's complaint of retaliation was based solely on derogatory comments by fellow employees); *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986) (Title VII held not to protect an employee from harassment outside the workplace by non-employees); *Landgraf v. USI Film Products*, 968 F.2d 427, 431 (5th Cir. 1992), *affirmed*, 511 U.S. 244 (1994) (refusal of co-employees to speak to plaintiff held not to constitute retaliation). See also *Robinson v. City of Pittsburgh,* 120 F.3d 1286 (3rd Cir. 1997) ("anger, irritation, dirty looks, even the silent treatment, can cause distress" but do not rise to the level of an adverse employment action) and *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996) (receipt of a negative performance review does not constitute retaliation).

Petitioner has done a masterful job of creating the appearance that this "conflict" is one of great importance. In fact, reading his petition makes it sound like most circuits have concluded that *all* acts of retaliation are prohibited whereas the Fifth Circuit has limited the scope of protection to those few acts of retaliation which constitute "ultimate" employment decisions. That is simply not the case, however.

B. The Ruling Below Does Not Conflict With Any Decision Of This Court

In his effort to get this Court to grant his writ application, petitioner argues that the Fifth Circuit's decision is "emphatically inconsistent" with this Court's decision in *Robinson v. Shell Oil Company*, 519 U.S. 337, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997). In that case, this Court concluded that Congress intended former employees (as well as current ones) to be protected from retaliation. This Court's decision in *Robinson* was based, in large part, on the fact that a primary purpose of Section 704(a) is to prevent retaliation. This Court employed the standard method of statutory construction of an ambiguous term and selected the interpretation which was most consistent with the purpose of the law.

Recognizing that one of the purposes of the anti-retaliation provisions of the Civil Rights Act is to prevent retaliation offers little help in this case however, because the choice or "conflict" between the circuits – if one even exists – is not between a method which does not protect

against retaliation and an approach which does.[9] As demonstrated above, the Fifth Circuit has not held that inappropriately small pay raises do not constitute retaliation. It merely held that, under the facts of this specific case, petitioner's substantial raise, which was larger than that received by some of his colleagues, did not support a claim of retaliation.

Petitioner's complaint is really that Congress did not choose to prohibit all possible manifestations of retaliation. Thus, he incorrectly suggests that it is "inconceivable that Congress intended to permit employers to ... [retaliate so as] to punish or deter utilization of the administrative and judicial enforcement mechanisms created by Title VII. (Petitioner's Brief, page 13.) In fact, however, that is precisely what Congress did by way of inserting the "adverse employment action" requirement. (And, if that result was unintended, Congress has had almost forty years to amend Section 704(a) in order to make it clear that it intended to outlaw all retaliation; not just that which rises to the level of an adverse employment action.)

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[9] Interestingly, the Fifth Circuit's approach to defining what is an adverse employment action would not prevent Charles Robinson from suing Shell Oil Company. The case involved an employee who, shortly after being fired by Shell, filed an EEOC charge. While that claim was pending, the employee applied for a job with another company, which contacted Shell for an employment reference. As a result of the reference given, the other company declined to hire the plaintiff. Blacklisting a former employee would be considered an ultimate employment action because it results in a decision not to hire that person. In fact, the Fourth Circuit, upon which the Fifth Circuit relied in reaching its position, reached that conclusion. See *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981).

Why would Congress have chosen not to prohibit all retaliation? One good explanation is the difficulty which would be created in attempting to enforce such a law. As this Court has recognized in connection with attempting to delineate when a "hostile work environment" constitutes actionable discrimination, in order to be workable, there must be both *subjective* and *objective* evidence of offensive conduct. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). See also *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Placing some rude, petty and unprofessional actions outside the scope of the protection of the Civil Rights Act is nothing more than a concession to the difficulties which would be created by attempting to enforce such rules, especially since they are, in the first instance, a matter of perception. It would be a nearly impossible task to sort out what is and what is not acceptable behavior, especially since each encounter involves a highly subjective and infinitely variable set of possibilities.[10]

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[10] This point can be illustrated using some of petitioner's own allegations of retaliation. Professor Kang has complained that, after he filed a charge of discrimination (following the selection of another candidate to become the Chairman of the LSU Department of Agronomy), some of his colleagues avoided him and failed to speak to him. He also alleged that others "cleared their throats" when passing by his office. And, on one occasion, a co-employee followed him into the faculty parking lot and then looked at him in a "threatening" manner.

Is it enough to smile when a co-worker passes or should it be accompanied by a nod? Is shaking hands and a perfunctory "Good morning" sufficient or must it be followed by some chit-chat and an invitation to lunch? Do all co-workers, including those whose offices are on a different floor or in another building, have to stop by to say hello? Once a day or more frequently? Should traffic signals be installed to prevent two employees from exiting the building at the same time so that one will not need to fear that he is being followed? Must an

(Continued on following page)

Not only is the Fifth Circuit's approach consistent with the result reached in *Robinson v. Shell Oil Company, supra*, it is also consistent with another case recently decided by this Court. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998), this Court added definition to the phrase "tangible employment actions" in the context of sexual harassment claims, by holding that, where a tangible job detriment occurs, the employer will be liable for supervisory sexual harassment. The definition of "tangible employment action" in this context is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. 118 S. Ct. at page 2268. That is, of course, the same approach taken by the Fifth Circuit for retaliation claims and reflects the same preference for clarity and predictability.

C. What Should The Rule Be?

In the event that this Court determines that the time is now ripe to attempt to give the phrase "adverse employment action" a more precise meaning and, further,

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employer forbid employees from clearing their throats in certain areas of the office?

Of course, the problems would not end with personal interactions between co-workers. The possibilities are virtually endless. Must an employer forever and automatically accede, following the filing of a charge of discrimination, to every request by that employee, for additional supplies, equipment and personnel with which to do his work? Can the employer even question the request for additional resources or is that showing a lack of respect which is actionable as retaliation?

decides to reach the merits of this issue at the writ grant/denial stage as it is authorized to do under Rule 16 of the Rules of the Supreme Court (by simply identifying one of the approaches as the one to be utilized instead of hearing oral arguments and issuing a formal opinion), LSU respectfully submits that the analysis used by the Fifth Circuit should be adopted and imposed on all circuits. This is an area where all concerned benefit tremendously from knowing the answer in advance. Even though, as petitioner points out, an unscrupulous employer will know exactly how to "safely" retaliate, that is a small price to pay for the certainty which is achieved by a "bright-line" test instead of a pure case-by-case method of working out the rules.

It is well known that employers almost always want to know, in advance, precisely which actions are allowed and which are not. As the Eleventh Circuit pointed out:

> Although we have interpreted Title VII to mean that an employer cannot retaliate by taking an 'adverse employment action' against an employee . . . we have never defined what this general phrase means. [As a result,] a reasonable employer 'has no way of knowing' for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII['s anti-retaliation provision].

Wu v. Thomas, 996 F.2d 271, 274 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994). Similarly, employees will also benefit by knowing, in advance, what costs they can be expected to have to bear if they file a claim of discrimination or otherwise engage in protected activity. Indeed, it is possible that the bright-line approach adopted by the Fifth Circuit benefits *employees* more than it does

employers because it destroys any misconception that a person might otherwise have about what can happen to him if he files a charge of discrimination. It is plainly unfair to have only a nebulous standard which does not alert someone in advance of the risks they are about to take.

And, finally, the courts will clearly benefit from a bright-line standard which eliminates the need for a time-consuming, painstakingly-slow, case-by-case analysis of the facts in each case of this type. As has been lamented on many occasions, the courts have no interest in serving as "super-personnel departments."[11]

The approach advocated by petitioner herein clearly has some advantages. It is unquestionably appealing to consider the facts of each and every case to make sure that the right to be free of retaliation assured by the Civil Rights Act of 1964 is being fully protected. By contrast, the "bright-line" approach adopted by the Fifth Circuit clearly leaves open the possibility, however slight, that someone whom Congress meant to protect, will be left unprotected. This Court unquestionably has the power to decide which approach better serves the needs of those at

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[11] See, e.g., *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (ADEA case); *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987); *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

risk of retaliation, including whether there are sufficient resources in the federal judiciary to engage in a case-by-case analysis of every claim of retaliation or whether a "bright-line" approach which offers everyone – courts, employers and employees alike – guidance will work better. The real issue, then, is whether this is a "problem" worthy of this Court's time. LSU respectfully submits that it is not.

CONCLUSION

For the foregoing reasons, LSU respectfully requests that this Honorable Court deny Manjit S. Kang's petition for writ of certiorari.

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(3)

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In The Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

v.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY, and the DEPARTMENT OF AGRONOMY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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I. THE FIFTH CIRCUIT'S ULTIMATE EMPLOYMENT ACTION DOCTRINE IS DIFFERENT FROM AND FAR MORE RESTRICTIVE THAN THE GENERAL RULE THAT ANY ALLEGED DISCRIMINATORY ACTION MUST BE *ADVERSE*

The Brief in Opposition confuses two quite distinct Title VII issues. All circuits hold that the discrimination forbidden by section 703 of Title VII, and by the anti-retaliation provision of section 704, is limited to *adverse* employment actions. Trivial slights that cause no real harm are not actionable. Direct economic harms, on the other hand, are always actionable. Paying a worker $100 a year less is an *adverse* action, regardless of whether the motive was race, gender, national origin or religion, or retaliation for protected activity. Paying Kang a lower raise was undeniably an adverse action in that sense, regardless of what unlawful motive may have been involved.

The Fifth Circuit alone[1] construes section 704 to contain an additional requirement not found in the general anti-discrimination provisions of section 703. Relying on differences in the terminology of section 703 and 704, the Fifth Circuit insists that a retaliatory act not only must be adverse (in the sense that it causes some non-trivial harm) but also must involve a particular *kind* of employment practice, viz. an ultimate employment decision.[2] Whether a retaliatory practice constitutes an ultimate employment action has nothing to do with the

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[1] The Eighth Circuit has at times adhered to the ultimate employment action doctrine, albeit arguably in a somewhat form.

[2] This textual analysis is set out in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (1997). This analysis has been widely criticized. *See, e.g.*, Note, *Adverse Employment Actions: The Wisdom of EEOC Guidance*, 54 RUTGERS L. REV. 739, 760-61 (2002); Comment, *Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard*, 27 U. DAYTON. L. REV. 217, 233-34 (2001).

magnitude of the harm (the traditional test for an adverse employment action); it turns solely on the *methodology* by which the harm was inflicted. Thus in the Fifth Circuit an action which indeed caused very serious harm, which would be actionable if taken on the basis of race, gender, or national origin (in violation of section 703), and which was taken for a retaliatory purpose, will nonetheless be lawful under section 704 if the particular type of retaliation utilized was not an ultimate employment action.

This case illustrates the difference between the widely accepted *adverse* employment action rule and the Fifth Circuit's distinctive *ultimate* employment action doctrine. Kang asserted he was improperly given a smaller pay raise; setting his raise at, for example, 3% rather than 4%, would over the years cost Kang thousands of dollars. That assuredly meets the general requirement of an *adverse* action; it would be actionable even in the Fifth Circuit if Kang had been given a lower raise because of his race. But under the ultimate employment decision doctrine, causing that same substantial harm for a retaliatory purpose is lawful in the Fifth Circuit because of the particular manner (a lower raise, rather than a reduction in Kang's existing salary) by which it was inflicted. The Fifth Circuit has in other cases applied the ultimate employment action doctrine to hold lawful retaliatory acts that undeniably were adverse and caused substantial injury. *E.g., Hernandez v. Crawford Building Materials Co.*, 321 F.3d 528 (5th Cir.), *cert. denied*, 124 S.Ct. 82 (2003) (overturning $20,000 damage award against employer that had filed a bad faith retaliatory counterclaim); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir.), *cert. denied*, 118 S.Ct. 336 (1997) (overturning $50,000 damage award for retaliatory harassment).

There is nothing fact-specific about the application of the ultimate employment action doctrine in this case. Respondent does not deny that under the decision below it is entirely lawful in the Fifth Circuit to award a lower raise in retaliation for activity protected by section 704. Respondent emphasizes that in the Fifth Circuit it would be illegal to retaliate by denying a raise *completely*, or

perhaps by providing only a trivial raise (*e.g.*, $1 a year) that was the equivalent of no raise at all. (Br. Opp. 7). But that limitation poses no serious obstacle for an employer which wishes to inflict a significant economic sanction on an employee who complained to the EEOC; the Fifth Circuit merely requires that the employer not be utterly blatant.

II. THE DIFFERING LEGAL STANDARDS UTILIZED BY THE COURTS OF APPEAL MEAN THAT MANY RETALIATORY PRACTICES ILLEGAL IN OTHER CIRCUITS ARE LAWFUL IN THE FIFTH CIRCUIT

Respondent suggests that, despite the sharp intercircuit conflict set out in the Petition and noted below, the circuits in practice reach similar results regarding what forms of retaliation are unlawful under Title VII. That assertion is palpably incorrect.

The circuits rejecting the ultimate employment doctrine have readily identified a wide range of specific retaliatory acts that are permitted only in the Fifth Circuit. For example, in rejecting the Fifth Circuit ultimate employment action standard, the Ninth Circuit explained:

> [W]e cannot square such a rule with our prior decisions. Actions that we consider adverse employment actions, such as the lateral transfers in *Yartzoff* [*v. Thomas*, 809 F.2d 1371 (9th Cir. 1987)] and *St John* [*v. Employment Development Dept.*, 642 F.2d 273, 274 (9th Cir. 1981)], the unfavorable reference that had no effect on a prospective employer's hiring decisions in *Hashimoto* [*v. Dalton*, 118 F.3d 671 (9th Cir. 1997)], and the imposition of a more burdensome work schedule in *Strother* [*v. Southern California Permanente*

> *Medical Group*, 79 F.3d 1371 (9th Cir. 1987)] are not ultimate employment actions.

Ray v. Henderson, 217 F.3d 1234, 1242 (9th Cir. 2000).[3]

In *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998), the Eleventh Circuit expressly joined the First, Ninth and Tenth Circuits in holding "that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." 141 F.3d at 1456. The Eleventh Circuit then proceeded to list decisions from those other circuits which had held unlawful specific retaliatory actions that "fall short of ultimate employment actions."

> *See Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provisions and listing as examples, "employer actions such as . . . disadvantageous transfers or assignments, . . . unwarranted negative job evaluations and toleration of harassment by other employees."); . . . *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that such non-ultimate employment decisions as "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10th Cir. 1996) (. . . malicious prosecution action brought by a former employer.)

141 F.3d at 1456.

In *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001), the Fourth Circuit held that the retaliatory acts alleged by the plaintiff in that case could be actionable,

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[3] The Ninth Circuit also noted that the standard in the Second and Third Circuits also permitted practices that had been held unlawful in past Ninth Circuit cases. 217 F.3d at 1242.

although they clearly would not have been in the Fifth Circuit.

> [T]he Fifth Circuit expressly held *insufficient* the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized *could constitute adverse employment action*. . . . If this circuit employed a similar "ultimate employment decision" standard in retaliation cases, then indisputably von Gunten would be unable to mount a prima facie case. This is so because none of [the defendant's] retaliatory acts constituted an ultimate employment decision – none involved hiring, firing, refusal to promote, or the like.

243 F.3d at 865 (Emphasis added). The Fourth Circuit spelled out the retaliatory acts against the plaintiff that would have been permitted under the Fifth Circuit's ultimate employment decision doctrine:

> These include withdrawal of the state car that had been issued to von Gunten since her employment began, forcing her to use her personal car for work travel and request reimbursement for her mileage expenses; downgrading her year-end evaluation; reassigning her to shoreline survey work; improperly handling various administrative matters; and subjecting her to retaliatory harassment creating a hostile work environment.

243 F.3d at 862-63.

In the instant case the Fifth Circuit held that giving a worker a lower raise in retaliation for protected activity was not an ultimate employment action. Other circuits which reject that narrow Fifth Circuit standard have concluded that setting a raise at a lower level is indeed an adverse action. *E.g.*, *Hildebrandt v. Illinois Department of Natural Resources*, 347 F.3d 1014, 1030 (7th Cir. 2003) ("Dr. Hildebrandt has shown each of the required elements of a prima facie case: . . . she suffered an adverse employment action, namely a paycheck reflecting her 1997 salary which was determined with a lower raise than that given her coworkers"); *Saleh v. Upadhyay*, 2001 WL 585085 *11

(4th Cir.) ("The reduction of Saleh's raises for three years in a row constitutes an adverse employment action. . . . ").

Respondent's defense of the ultimate employment decision doctrine baldly reveals the grave problem posed by that standard. The Fifth Circuit rule, respondent explains, permits an employer to know "exactly how to 'safely' retaliate." (Br. Opp. 13). This result, respondent argues, is good for employees, because in the Fifth Circuit they know in advance what forms of retaliation may be used against them if they complain to the EEOC or engage in other protected activity. "[E]mployees . . . benefit by knowing, in advance, what costs they can be expected to have to bear if they file a claim of discrimination or otherwise engage in protected activity. . . . [I]t destroys any misconception that a person might otherwise have about what can happen to him if he files a charge of discrimination." (Br. Opp. 13). That is assuredly inconsistent with the very purpose of section 704, which was to *prohibit* retaliation, not merely to regulate and publicize the forms of permissible reprisals. Section 704 was enacted to maintain "unfettered access to statutory remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 348 (1997), not simply to require advance notice of the types of sanctions that can be imposed for using those mechanisms.

III. THE INTER-CIRCUIT CONFLICT PRESENTED BY THIS CASE IS WIDELY RECOGNIZED

This case presents one of the most widely recognized inter-circuit disputes in federal employment law. Every commentator to consider the issue has emphasized the existence and importance of that conflict.

> Within the United States Circuit Courts of Appeal, current disagreement exists concerning the meaning of "adverse employment action" [in retaliation cases]. There are two basic interpretations: one interpretation considers mostly any adverse action by an employer motivated by the desire to retaliate actionable and the other

> interpretation enforces a much stricter standard that requires the adverse employment action be an "ultimate employment action." . . . The result of this strict interpretation of the adverse employment action, which is expressly rejected by the EEOC, is that much employer conduct that is actionable in other . . . circuits is not actionable in the Fifth and Eighth Circuits.

Note, *Adverse Employment Actions: The Wisdom of EEOC Guidance*, 54 RUTGERS L. REV. 739, 45-48 (2002) (Footnotes omitted); *see id.* at 746-47 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

> The disagreement between the circuits has created a landscape of case-law that is heavily dependent on which circuit a plaintiff is auspicious enough to be able to bring suit in. As a consequence of the unpredictability and inherent unfairness of such a situation . . . the Supreme Court should address the issue and ultimately require deference to the more soundly reasoned EEOC guidelines.

Id. at 741.

> [There is a] controversy among the circuits surrounding the scope of . . . "adverse employment action". . . . Prohibited employer behavior characterized as adverse employment action varies markedly. Its definition ranges from a liberal construction of adverse employment action, including such things as mere changes in the workplace, to a restrictive interpretation characterizing only ultimate employment decisions as adverse.

Note, *Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims*, 90 KY. L. J. 273, 275-76 (2002) (Footnotes omitted); *see id.* at 280-81 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

> The conflict among the circuits over the adverse employment action element of a retaliation claim is one ripe for Supreme Court resolution. The application of disparate standards to individual cases "has left employers to guess what employment actions might be considered unlawful retaliation."

Id. at 276, 292 (Footnote omitted).

> When it took the broad view of adverse employment actions in [*Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)], the Ninth Circuit joined the First, Seventh, Tenth, Eleventh, and D.C. Circuits in the current three-way split on this issue. . . . The Fifth and Eighth Circuits take the most restrictive view and require the retaliatory action to be an "ultimate employment decision" before it rises to the level of an adverse employment action.

Note, *The Meaning of Adverse Employment Actions in The Context of Title VII Retaliation Claims*, 9 WASH. U. J. L. & POL'Y 379, 380-81 (2002) (Footnotes omitted).

> The circuits . . . are split on what activities may qualify as an adverse employment action [in a retaliation case.] . . . The First, Second, Seventh, Ninth, Tenth, and D.C. Circuits have all joined the Eleventh Circuit in holding that employers can be liable for retaliation under Title VII even when their actions do not reach the level of an ultimate employment decision. . . . Unlike the narrow-interpretation circuits, the broad-interpretation circuits have readily recognized that an adverse employment action can be more than basic hiring, firing, or failing to promote.

Note, *An Adverse Employment Action – Not Just An Unfriendly Place to Work: Co-Worker Retaliatory Harassment under Title VII*, 87 IOWA L. REV. 235, 236-42 (2001) (Footnotes omitted); *see id.* at 244-54 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

> [F]ederal appellate . . . courts are sharply divided as to what constitutes an adverse employment action [in a retaliation case]. A minority of courts argue that only "ultimate employment decisions," such as hiring, firing or demoting, are considered "adverse employment actions." A majority of courts, however, contend that the employer's alleged retaliatory action need not reach the level of an "ultimate employment decision," . . . This split concerning what constitutes an adverse employment action under the retaliation provisions of Title VII is causing an uneven application of the law in the federal circuits.

Comment, *Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard*, 27 U. DAYTON L. REV. 217, 219-30 (2001) (Footnotes omitted).

> [T]he ultimate employment decision standard contradicts Supreme Court precedent. . . . Adoption of the ultimate employment decision standard has the potential to encourage employers to retaliate against individuals exercising their Title VII rights, so long as no retaliatory act amounts to an "ultimate employment decision."

Id. at 233-34 (Footnotes omitted).

> Currently the federal circuits are split in what they hold to be an adverse employment action constituting retaliatory discrimination. . . . Among the federal circuit courts, three basic positions have emerged. Some circuits . . . hold that only "ultimate employment actions" such as hiring, discharging, demoting, or changing compensation constitute adverse employment actions. Other circuits take the position that, to be adverse under the statute, an action must "materially affect" the compensation, terms, conditions, or privileges of employment. The third group uses a very broad interpretation of adverse action, reflective of the EEOC guidelines, finding the standard met if the action is "reasonably

> likely to deter employees from engaging in protected activity,". . . .

Casenote, *Staying on the Straighter and Narrower: A Criticism of the Court's Definition of Adverse Employment Action Under the Retaliation Provision of Title VII*, 43 S. TEX. L. REV. 1323, 1333-34 (2002) (Footnotes omitted); *see id.* at 1335 (listing retaliatory practices only lawful under the ultimate employment action doctrine).

CONCLUSION

In briefs filed in the lower courts, the EEOC has repeatedly expressed the view that the ultimate employment action doctrine leads to materially different results than the majority interpretation of section 704, and that the highly restrictive Fifth Circuit view poses a serious threat to the Title VII administrative process. If the Court is uncertain as to the importance of the inter-circuit conflict raised by this case, it might be appropriate to invite the Solicitor General to file a brief expressing the views of the United States.

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the court of appeals.

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